OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 02-06 July 19, 2002

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.*

This memorandum sets forth guidance as to procedures and remedies concerning employees who may be undocumented aliens in light of the Supreme Court's recent decision in *Hoffman Plastic Compounds, Inc. v. NLRB.*[1] General Counsel Memorandum GC 98-15, dated December 4, 1998, is modified by this memorandum.

A. The Supreme Court's *Hoffman* Decision.

In *Hoffman Plastic Compounds,* the Supreme Court reversed enforcement of a Board order awarding backpay to an undocumented worker whom the respondent hired without knowledge of his immigration status. The Court found that the Immigration Reform and Control Act of 1986 ("IRCA"), developed a comprehensive scheme to combat the employment of undocumented workers in the United States. The Court concluded that IRCA foreclosed the Board from awarding backpay to an individual who was not legally authorized to work in the United States during the backpay period inasmuch as the award conflicted with federal statutes and policies unrelated to the Labor Act. *Hoffman* at 1283.

According to the Court, a backpay award "for a job obtained in the first instance by [the applicant's] criminal fraud ... not only trivializes the immigration laws, it also condones and encourages future violations." Id. at 1283, 1284. Moreover, the Court disallowed backpay because the discriminatee was unable to comply with Board law requiring him to mitigate damages by seeking lawful interim employment. Id. at 1284. However, the Court noted that the Board retains "other significant sanctions" to deter these discharges. The Court specifically raised, by way of example, notice posting provisions and cease and desist orders, subject to contempt sanctions should a respondent fail to comply. Id. at 1285.

B. Prior Law Unaffected by *Hoffman.*

The Supreme Court's decision in *Hoffman Plastic Compounds* has left intact several basic principles set forth in prior court and Board decisions and GC Memoranda.

1. Coverage of the Act.

The *Hoffman* offman Court reaffirmed its prior holding in *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 892 (1984), that undocumented aliens are employees under the National Labor Relations Act. *Hoffman* at 1281. Accordingly, it is unassailable that all statutory employees, including undocumented workers, enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status.[2]

2. Liability for Unlawful Discharges.

Because all statutory employees enjoy Section 7 rights, *Hoffman* does not change the conclusions set forth in Memorandum GC 98-15 at p. 4, that an individual's work authorization status is irrelevant to a respondent's liability under the Act and that questions concerning that status should be left for the compliance stage of the case.[3] The Court in *Hoffman* dealt only with a remedial question, and thus, as set forth above, does not overturn otherwise settled Board and Court law. Thus, Regions should continue to object to a charged party's attempt to elicit evidence concerning an employee's asserted undocumented status in order to escape unfair labor practice liability.

3. Representation Issues.

If an individual is otherwise employed by the employer, that employee's immigration status is irrelevant to a unit determination or voter eligibility. In *Intersweet, Inc.*, 321 NLRB 1, 17 and n. 68, the Board approved a *Gissel* bargaining order where the ALJ held that there is no reason "to distinguish between undocumented employees' right to vote in a representation election and the operative effect of their authorization cards as a basis for a bargaining order." Similarly, in *County Window Cleaning Co.*, 328 NLRB 190 n.2, the Board overruled a challenge to an election ballot based on immigration status.[4]

4. Reinstatement Rights of Undocumented Discriminatees.

Conditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented discriminatees whom an employer knowingly hires. In *A.P.R.A. Fuel Oil Buyers Group,* 320 NLRB 408, 415 (1978), enfd. 134 F.3d 50 (2d Cir. 1997), the Board ordered an employer that knowingly hired undocumented workers to reinstate them, conditioned on the employees' satisfaction of IRCA's verification procedure. Thus, the Board ordered the employer to hold open a reinstatement offer for "a reasonable time" to allow the employees to establish their work eligibility. The Board explained that this conditional remedy extends full statutory protection to employees within IRCA's framework, while eliminating an unscrupulous employer's incentive to violate the Act.

Because the General Counsel did not seek a conditional reinstatement order in *Hoffman,* the Court did not have occasion to pass on this remedy.[5] Accordingly, the *Hoffman* decision does not preclude the Board from imposing a conditional reinstatement order against employers who flout both the Act and IRCA by hiring and firing known undocumented workers. Because the employee must comply with IRCA prior to reinstatement, a conditional order satisfies the Court's concern that the Act not conflict with IRCA's extensive employment verification system.

However, where a respondent, as in *Hoffman*, establishes that it would not have hired or retained the discriminatee had it known of his or her undocumented status during the period of employment, Regions should refrain from seeking a reinstatement remedy.

C. The *Hoffman* Decision's Impact on Extant Board Law.

We further conclude, however, that the *Hoffman* decision impacts the Regions' practices in several ways.

1. Backpay for Discriminatory Discharges.

The Court clearly held that backpay is unavailable to remedy the discharge of individuals for the period of time they were legally unavailable to work in this country. Thus, Regions should not seek a backpay remedy once evidence establishes that a discriminatee was not authorized to work during the backpay period.

A question arises, however, as to whether the Board can order backpay when -- in contrast to *Hoffman* -- an employer knowingly hires an undocumented worker. In *A.P.R.A. Fuel Oil Buyers Group*, the Board awarded a limited backpay remedy to discriminatees whom the employer hired knowing of their undocumented status. The Board held that the backpay period expired when either (1) the employer reinstated them subject to IRCA's verification requirements, or (2) the employees were unable to establish after a "reasonable time" that they were authorized to work in this country. 320 NLRB at 415.

The *Hoffman* decision arguably does not affect the Board's remedy in A.P.R.A. because the employer in *Hoffman* was unaware that the discriminatee was undocumented when it hired him. However, the clear thrust of the majority opinion precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstance of their hire. The Court held that backpay to the discriminatee in *Hoffman* is contrary to IRCA policies that criminally sanction aliens who "obtain employment with false documents." These are policies which the Board has no authority to enforce or administer. *Hoffman*, at 1283. Because the Court's considerations focused on the employee's wrongdoing and apply in equal measure whether or not the employer knowingly hired undocumented employees, backpay in either event should not be sought.[6]

2. Backpay in Non-Discharge Situations.

Hoffman did not address whether backpay is available in non-discharge situations, such as instances where a discriminatee has continued to be employed but at unlawfully imposed terms. Examples include a unilateral change in working conditions or a discriminatory transfer to a lower paying position.

We conclude that the Court did not preclude compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions, e.g., a unilateral change of pay or benefits.7 These situations do not award backpay to undocumented workers for "work not performed ...." *Hoffman*, at 1283, but instead make employees whole for work they have already performed and for which they did not receive full compensation. The Department of Labor has applied this distinction in deciding to continue to seek a monetary remedy to compensate undocumented employees for substandard payments in violation of the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.8

Backpay for an employee who has been unlawfully demoted into a lower paying position appears to present an open question. Since the discriminatee is being paid the proper rate for work performed in the new, lower position, backpay to compensate the employee for earnings he or she would have made had they remained in a previous position could arguably invoke the Court's concern about backpay for work "not performed." Alternatively, the employee continued to be employed, albeit involving different duties from the discriminatee's prior position, and has no further duty to mitigate. Thus, a backpay award may not run counter to the Court's rationale. Regions facing this issue should submit the question for Advice.

D. Board Remedies After *Hoffman*.

The Court held that its reversal of the Board's backpay award has no effect on "other significant sanctions." *Hoffman*, at 1285. The Court expressly noted that a cease and desist order, subject to contempt proceedings, remains a significant deterrent against future statutory violations. Contempt sanctions, of course, are available only for violations of court-enforced Board orders obtained through litigation or formal settlements. Accordingly, to provide a meaningful remedy for meritorious unfair labor practice allegations involving undocumented workers, Regions should seek a formal settlement in cases involving employers that knowingly hire undocumented workers and use their work authorization status to threaten and discharge them in retaliation for their Section 7 activity.

Such an approach is consistent with the policy that formal settlements "may be warranted where there is a likelihood of recurrence or extension of the instant unfair labor practices ...." Casehandling Manual (Unfair Labor Practices), s. 10164.2. In these circumstances, the threat of contempt sanctions is a valuable and necessary disincentive against this pattern of statutory violations and formal settlements are an effective and immediate means of obtaining this deterrent.

Regions should use their discretion to determine the propriety of formal settlements where an employer unknowingly hires undocumented workers. Moreover, in most cases, Regions should seek to remedy unfair labor practices against undocumented workers by requiring the notice to be read to employees. Notice readings are particularly appropriate under these circumstances because the Board's ability to reassure remaining employees that it will protect their Section 7 rights is greatly limited where it cannot reinstate or seek backpay for undocumented workers.

In addition, Regions should consider the propriety of other remedies where they are specifically tailored to individual circumstances. For instance, Regions should seek to compel an employer to continue to assist an undocumented worker in his or her efforts to become regularized where the discrimination itself is the employer's discontinuance of its previous support. If Regions believe that other extraordinary remedies, such as union access to employees or to employee rosters, may be appropriate to remedy violations during union organizing campaigns, Regions should submit the case to Advice.

E. Investigative Procedures Affected by *Hoffman*.

The *Hoffman* decision clearly established that an employee's immigration status may become a relevant factor during the compliance and settlement phases. Proof of a discriminatee's undocumented status, as with any other defense to reinstatement or backpay, must be established through evidence proffered by the party making the allegation, and not through a *sua sponte* regional investigation. The *Hoffman* decision does not shift the burden onto the Board to conduct an immigration investigation

in the first instance. In fact, this issue arose in *Hoffman* not pursuant to an investigation, but because the discriminatee admitted on the witness stand during a compliance hearing that he was undocumented throughout the backpay period.

Regions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. Regions should begin their analysis with the presumption that employees and employers alike have conformed to the law. The law -- IRCA -- protects employees against harassment by an employer which seeks to reverify their immigration status without cause. A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented. Once an employer makes this showing, Regions should investigate the claim by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence. Again, a mere assertion is not a sufficient basis to trigger such an investigation.

Finally, issues of entitlement to backpay remaining after such an investigation should be submitted to Advice.

In summary, Regions should follow the following procedure.

- Regions generally should presume that employees are lawfully authorized to work. They should refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.
- Regions should investigate the discriminatee's immigration status only after a respondent establishes the existence of a genuine issue.
- Regions should conduct an investigation by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence.
- If a party raises the issue of an employee's immigration status at a representation case hearing, the Hearing Officer should not permit the evidence to be adduced, but rather should allow the party to present a brief offer of proof.
- Regions should submit a case to Advice if, after its investigation, questions remain as to whether the evidence establishes that the discriminatee is entitled to backpay.
- Regions should submit cases to Advice with recommendations to seek special remedies involving undocumented workers.

Cases which present issues not resolved by this memorandum should be submitted to the Division of Advice.

/s/
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[1] **122 S. Ct. 1275 (2002).**

[2] **See *County Window Cleaning Co.*, 328 NLRB 190 n.2 (1999).**

[3] *See Intersweet, Inc.,* 321 NLRB 1, 1, n.2 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997) (consideration of employer's contention that discriminatees were not entitled to backpay or reinstatement because they had no legal right to work in the United States left to the compliance stage).

[4] If a party raises the issue of an employee's immigration status at a representation case hearing, the Hearing Officer should not permit evidence to be adduced, but rather should allow the party to present a brief offer of proof. *See, e.g.,* Board's Health Care Rule, Second Notice of Proposed Rulemaking, 53 Fed.Reg. 33933, 284 NLRB 1528, 1574-1575 (1989) (Hearing Officer to receive offer of proof, rather than evidence, on "extraordinary circumstances" contentions). An offer of proof will give the Board the context to reconsider the relevance of the employee's immigration status, should it choose to do so.

[5] Writing for the dissent, Justice Breyer noted this distinction when he observed that backpay for undocumented workers whom an employer knowingly hires was not before the Court. *Hoffman*, at 1287.

[6] The Court found further support for its conclusion that backpay is inappropriate in an undocumented worker's inability to seek lawful interim employment in order to mitigate damages. *Hoffman* at 1284. Regions should submit to Advice cases where an undocumented worker is able to lawfully mitigate backpay by some measure.

[7] However, as with discriminatory discharges, backpay is unavailable for undocumented employees who are terminated because of an employer's unlawful unilateral change in terms and conditions of employment.

[8] See "*Hoffman Plastic Compounds, Inc. v. NLRB,* Questions and Answers," prepared by the U.S. Department of Labor, at p. 2. *See also Liu v. Donna Karan Intern., Inc.*, No. 00 Civ. 4221, 2002 WL 1300260 (S.D.N.Y. June 12, 2002) (denying request for discovery of employees' immigration status in defense to FLSA claims; court questioned whether *Hoffman* was applicable, because *Hoffman* Court only discussed award of backpay for work not performed).